IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

Crl. Appeal No. 07/2002

Sri Kundan Singh & another

Vs

State

Date of decision:- 13/4/2006

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date:- 13/4/2006 Initials of Judge

Note:- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

High COURT OF UTTARANCHAL, AT NAINITAL

CRIMINAL APPEAL NO.07 OF 2002

1. Sri Kunadan Singh
   S/o Sri Amar Singh
2. Sri Mohan Singh
   S/o Sri Amar Singh
   Both R/o village Bhatachauri (Bagetia)
   Riyunilakhmar, Patti Gagarigole
   Tehsil Bageshwar
   District Bageshwar ……Appellants

Versus

State of Uttaranchal ……Respondent

Date: - 13th April, 2006

Mr. M. S. Pal learned counsel for the appellants
Sri A. Rab learned Addl. G.A.

Hon'ble J.C.S. Rawat, J.

1. This is a criminal appeal against the judgment and order dated 13.12.2001 passed by Sri Ram Das, the then Sessions Judge, Bageshwar in S.T. No.2/2001, whereby the appellant-Kundan Singh was convicted and sentenced to undergo R.I. for a period of ten years under section 304B IPC. Both the appellants were convicted and sentenced to undergo R.I. for a period of two years under section 498A I.P.C. However, the appellant-Mohan Singh was acquitted from the charge under section 304B I.P.C. All the sentences would run concurrently.

2. Brief facts of the prosecution case are that a report was lodged on 24.08.2000 at the patti patwari by one Anand Singh Rana alleging therein that the marriage of his daughter-Smt Pushpa Devi was solemnized three years' ago with the appellant Kundan Singh according to Hindu rites and customs. Immediately after the marriage, her husband used to assault her on account of demand of dowry and the

‘Jeth’ & ‘Jethani’ of his daughter i.e. Mohan Singh and Smt. kamla Devi respectively also used to harass Smt. Pushpa Devi by giving her physical and mental torture. Whenever Smt. Pushpa Devi came to her parental house, she used to narrate her parents the entire story about the dowry demand. It was further alleged in the FIR that Smt. Kamal Devi used to say the deceased that they would not keep her in the matrimonial house because Smt. Pushpa Devi (deceased) was not having a child. The investigation was taken up as usual which culminated into the submission of the chargesheet. After submission of chargesheet the accused were committed to the Court of Sessions for trial and the trial court framed charges against the accused persons. The accused persons denied charges leveled against them and claimed the trial.

3. The prosecution in order to support its case examined as many as five witnesses. Anand Singh (P.W.1) and Smt. Govindi Devi (PW2) were the father and mother of the deceased respectively. They have stated that the appellants were demanding dowry. When the demand was not fulfilled they started harassing and torturing the deceased and committed cruelty upon her. It was further stated that the deceased, who came to her parental house on the Ghee Sakaranti i.e. eight days before the death, had stated that her husband and her in-laws were demanding gold nettles chain and they were also harassing and committing torturing her in connection with dowry demand. But, her parents could not fulfill the dowry demand and the deceased went to her matrimonial house. Thereafter, an information regarding her death had been received. The prosecution has also adduced the evidence of Bhim Singh Rana (PW3), who proved

the factum of panchayatnama (Ex.Ka.3). He also proved the chalan lash (Ex.ka.4) and photo lash (Ex.ka.5). Dr. N.D. Punetha (PW4) had conducted the postmortem of the deceased. The doctor opined that the cause of death could not be ascertained as such visera preserved. The doctor has proved the postmortem report (Ex.Ka.10). The prosecution has also adduced the evidence of Kailash Chandra Toliya (PW5) the then Taib Tehsildar. He has stated that the husband of the deceased gave an information that his wife had consumed poison. The father of the deceased lodged a report before him. He was the Investigating Officer and he submitted the chargesheet against the appellants.

4. In the statement recorded u/s 313 Cr.P.C. the accused persons denied the prosecution case and stated that they have been falsely implicated in this case. Kundan Singh has stated in his evidence that the deceased has committed suicide, as she had not having a chiled. No defence evidence was adduced by the appellants.

5. The learned trial court after appraisal of the evidence on record, the appellants was convicted and sentenced as mentioned above.

6. I have heard the learned counsel for the parties and perused the evidence on record.

7. It needs to be mentioned here that it is not disputed that the deceased met a homicidal death. It is also admitted that the deceased was married three years ago with the appellant Kundan Singh and she

was legally wedded wife of Kundan Singh. The prosecution has taken the case that the death was caused by administering poison to the deceased, whereas the defence has taken a plea that the deceased committed suicide. Postmortem report was conducted by Dr. N.D. Punetha (PW4), who has given a report that the cause of death could not be ascertained and as such the visera was preserved. Visera report reveals that the visera contained the poison. These facts clearly reveals that it is a case of unnatural death.

8. Now, I have to determine as to who is responsible for causing the death of the deceased. It is a well settled principle of law that in order to convict an accused for an offence under section 304B IPC, the following essentials must be satisfied:-

(i) *The death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances.*

(ii) *Such a death must have occurred with in seven years of her marriage.*

(iii) *Soon before her death, the woman must have been subjected to cruelty or harassment by her husband or by relatives of her husband.*

(iv) *Such cruelty or harassment must be for, or, in connection with demand of dowry.*

(v) *Such cruelty or harassment is shown to have been meted out to the woman soon before her death.*

9. If the prosecution establishes the ingredients of section 304B IPC as indicated above then a presumption of dowry death shall be drawn against the accused under section 113 B of the Indian Evidence Act. It is to be kept in mind that a presumption under section 113 B is a presumption of law. Both the sections 304B and 113 B were inserted by the Dowry Prohibition Amendment Act (No.43 of 1986) with a view to combat the increasing menace of dowry deaths. Section 113 B reads as follows:-

> *"113B:- Presumption as to dowry death- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person caused the dowry death.*
>
> *Explanation: - For the purposes of this section 'dowry death' shall have the same meaning as in section 304B of the IPC (45 of 1860).*

10. On proof of essentials mentioned in section 304B IPC it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials:-

(i) The question before the court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the

accused is being tried for the offence under section 304B IPC)

(ii) The woman was subjected to cruelty or harassment by her husband or his relatives.

(iii) Such cruelty or harassment was for, or in connection with any demand of dowry.

(iv) Such cruelty or harassment was soon before her death.

11. A conjoint reading of section 113B of the Evidence Act and section 304B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the 'death occurring otherwise than in normal circumstances'. The expression 'son before' is very relevant where section 113B of the Evidence Act an section 304B IPC are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. 'Soon before' is a relative term and it would depend upon circumstances of each case and no striait-jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brigs in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under section 113B of the Evidence Act. The expression 'soon before her death' used in the substantive section 304B IPC and section

113B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated express ‘soon before’ is not defined. A reference to expression ‘son before’ used in section 114, Illustration (a) of the Evidence Act is relevant. It lays down that a court may presume that a man who is the possession of goods ‘soon after the theft, is either the thief has received the goods knowing them to be stolen, unless he can account for his possession. The determination of the period which can come within the term ‘soon before’ is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression ‘soon before’ would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence.

12. The word ‘cruelty’ used under section 304B IPC is not defined under that section. Section 498A IPC makes cruelty by husband to the wife as a punishable offence. The wourd ‘cruelty’ has been defined in explanation appended to the said section. Section 498A IPC with the explanation there under reads as follows:-

> *“498A :- Husband or relative of husband of a woman subjecting her to cruelty – Whoever, being the husband or the relative of the husband of a woman, subjects such woman*

to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation: - For the purpose of the section 'cruelty' means-

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury to danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

13. The prosecution has to establish that soon before her death the deceased must have been subjected to cruelty by her husband or by his relatives. The prosecution has adduced the evidence of PW1 Anand Singh and PW2 Smt. Govindi Devi. They have made statement that her husband and in-laws were demaning dowry and the deceased was subjected to cruelty due to non-fulfillment of the dowry demand. PW1 appeared before the court and taken a case that the deceased came to her parental house on Ghee-Sakranti i.e. eight days before the death and stated to her parents that her husband was demanding golden chain. PW1 had also stated that the deceased was subjected to harassment and cruelty immediately after the marriage. He also stated that the appellant Mohan

Singh had ill-intention against the deceased. The appellant-Mohan Singh used to try to enter into the room of the deceased with bad intention, but he could not succeed in his bad intention. The deceased had complained to her husband and the wife of Mohan Singh-appellant, but they did not pay heed to her complaint. PW2 had also narrated the same story in her evidence. It is also revealed from the cross examination of both these witnesses that these statements were not given to the I.O. at the time of investigation. Both had stated that they narrated the entire story to the I.O. but they did not know why their statement had not been recorded by the I.O. When the I.O. Kailash Chandra Toliya was examined before the court below, he stated that both these witnesses had not stated this fact to him.

14. Learned counsel for the defence contended that the theory which has been propounded in the evidence is an afterthought and if it was a real fact it should have been stated when the statement under Section 161 Cr.P.C. was recorded. If this statement was not given by the witnesses to the I.O., it shows that the theories regarding the demand of golden nettles and the deceased came to her parental house before eight days from her death is an afterthought. Learned A.G.A. tried to clarify the position, but he could not clarify. The I.O. had stated in his evidence that the said statement had not been recorded by him. As such, this fact reveals that the said statement is an afterthought.

15. The FIR only contains the vague allegations with regard to the dowry demand. No specific details have

been given in the FIR. This fact could have been ignored if they would have stated the details in the statement recorded under section 161 Cr.P.C. The complainant had not stated anything in the FIR as well as in the statement recorded under section 161 Cr.P.C. that soon before the death the deceased was subjected to cruelty in connection with dowry demand. The statement was recorded after a lapse one year from the date of incident. It cannot be ruled out that there is an embellishment in the story narrated by the prosecution.

16. The incident took place on 23.08.2000 and the report was lodged on 29.08.200. No explanation for delay was given at the time of lodging the FIR. No such explanation has come forward during the statement recorded under section 161 Cr.P.C. The FIR is very important document and the prompt FIR gives the confidence that it is a correct version and the facts which have been mentioned there in are correct. If the FIR has been lodged by undue delay, it should have been properly explained at the time of lodging the FIR. The delay in lodging the FIR shows that it was the outcome of due consultation or deliberation. FIR in a criminal case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstances in which the crime was committed, including the names of the actual culprits and the parts played by them, the names of the eye witnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the

introduction of a coloured version or exaggerated story. In the instant case, the FIR was lodged on the basis of the typed report, which was written by a typist. The informer has also stated in his evidence that the facts which have been stated by his counsel, have been stated incorporated in the FIR.

17. Allegations against the appellant Mohan Singh have been made that he used to try to visit in the room of the deceased with bad intention prior to the date of incident. Though, this fact has not been proved. Such allegation does not find place in the statement recorded under section 161 Cr.P.C. If such type of incident took place, it should have been brought to the knowledge of her parents. The matter was very serious and it had been suppressed as has been stated in the evidence. This shows that there was an unnatural conduct of the prosecution.

18. PW2 had also stated that she saw the injuries on the person the deceased after the death and the same statement has been given by the PW2. When PW2 was asked why this fact has not been mentioned in the FIR, he stated that he had only written the facts which have been stated by his counsel. Postmortem report reveals that there was no injury on the person of the deceased. The panchayatnama of the deceased does not contain any averment that there was nay injury on the person of the deceased. Therefore, the said facts which was stated by the PW1 & PW2 seem to be an afterthought.

19. It is also in the evidence that the parties had no source of income and they could not bear their expenses. It was contended that if the status of the

parties was so poor how the other party could claim the dowry. It was contended that such dowry can only be demanded from the person who can fulfill the demand. The status of the parties narrates the fact that they are very poor and they did not have food for daily needs. It was pointed our that this fact also leads to take inference that the FIR was only lodged to extract the money from the other party.

20. In view of the above discussion, the prosecution has failed to prove the ingredients of point nos. (ii), (iii) & (iv) of section 304B as mentioned in Para 10 of my judgment. If the said ingredients are not proved, the presumption of section 113B cannot be attracted in this case. Therefore, the prosecution has not established the guilt beyond any reasonable doubt against the appellants. I find that the learned trial court has erred in convicting and sentencing the appellant. Hence, the appeal is allowed and the conviction and sentence against the appellants awarded by the trial court are set aside. Their bail bonds are cancelled and sureties discharged.

20. Let the lower court record be sent back to the court concerned.

(J.C.S. Rawat, J.)

Dated 13.04.2006
LSR